Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

ARNAUD GIRARD and NAJA BISSAR - PETITIONERS

Vs.

THE CITY OF KEY WEST - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

APPENDIX

ARNAUD GIRARD
NAJA GIRARD (BISSAR)
P.O. BOX 6263
KEY WEST, FLORIDA 33041
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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16404
Non-Argument Calendar

D.C. Docket No. 95-10074-CV-KMM

ARNAUD GIRARD,
NAJA BISSAR,

Plaintiffs-Appellants,

versus

CITY OF KEY WEST,
MARC SUMMERS, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(October 25, 2001)

Before EDMONDSON, WILSON, and GODBOLD, Circuit Judges.

PER CURIAM:

APPENDIX A

Plaintiffs-Appellants Girard and Bissar ("Girards" or "Plaintiffs"), proceeding pro se, filed this 42 U.S.C.§ 1983 action against Defendants-Appellees, City of Key West and several City employees ("City" or "Defendants") in their official capacities. The district court found no municipal liability under section 1983 and granted Defendants' motion for summary judgment. The district court held that each of the challenged acts was subject to meaningful administrative review and did not represent official policy or actionable custom. Plaintiffs now appeal. We affirm.

I. Standard of Review

We review de novo a district court's order granting summary judgment. See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1357 (llth Cir. 1999).

II. Background

Arnaud Girard and Naja Bissar, husband and wife, owned a sailboat that was moored at a dock where tenants were permitted to live aboard their vessels, and a shop at the Key West Bight Marina. Ms. Bissar (Girard) leased a small commercial space for her shop from the City of Key West. The lease included the use of the shop space and one dinghy space at the City dock for which she was not charged. The Girards were tenants of the Key West Bight Marina for at least a year and a half. The City was responsible for overseeing the operation of the marina by and through the City Manager and the Key West Bight Management District Board ("Board").

The City had an opportunity to lease to a private ferry company part of the dock space at which tenants were permitted to live aboard their vessels, and adjacent upland. This meant possible eviction of the tenants at the dock, including the Girards. In response the Girards outwardly opposed the leasing by organizing a tenants association and notifying the local media of tax problems with the City's plan.

The Girards claim that after they began publicly opposing the City's proposed actions regarding the docks the city subjected them to a number of retaliatory actions including: (1) a Bight Manager's decision to evict them from the commercial shop, that was upheld by the Board; (2) a Bight Manager's decision to evict the sailboat, that was upheld by the Board; and (3) the City's ultimate decision to evict Plaintiffs from the commercial shop.

III. Procedural History

The Girards originally alleged violations of the Equal Protection Clause and the First Amendment. The district court dismissed all claims except a due process/deprivation of property claim and a pendent state claim. The jury returned a verdict in favor of the City on the remaining claims. On appeal this court affirmed on all claims except the equal protection claim, which it reversed and remanded. Girard v. City of Key West, No. 97-5621 (llth Cir. December 21, 1998). Back in the district court the court permitted plaintiffs to file a second amended complaint that raised numerous alleged equal protection violations that had been alleged on other grounds in the appeal and had been denied. Also plaintiffs alleged a new First Amendment/free speech claim based on events allegedly occurring subsequent to the dismissal of the first complaint. On consideration of the second amended complaint the district court granted summary judgment in favor of the City by applying §1983 and holding that each of the challenged City acts was subject to meaningful administrative review and did not represent official policy or actionable custom.

IV. Discussion

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...
>
> 42 U.S.C. §1983.

Under §1983 a plaintiff must first establish that a defendant is acting under a "statute, ordinance, regulation, custom, or usage." Id. Next the plaintiff must prove that he or she is deprived of "rights, privileges, or immunities secured by the Constitution and laws." Id.

Municipalities may not be held liable under section 1983 on the theory of respondent superior. See Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed2d 611 (1978). Rather they may be held liable only if such constitutional tort results from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law. See id. at 694,98 S.Ct. At 2037-38; Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (llth Cir. 1997). For the actions of a government official to be deemed representative of the municipality the acting official must be vested with final policymaking authority. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986)

There are three issues before this court. First, whether Bight Management were officials vested with final policymaking authority. Second, whether an unconstitutional custom or practice existed. Third, whether a constitutional deprivation occurred.

A. FINAL POLICY MAKING AUTHORITY

Section 1983 liability may be based upon a single illegal act by a municipal officer only when the act fairly represents official policy, such as when that municipal officer possesses final policymaking authority over the relevant subject matter. See Scala v. City of Winter Park, 116 F.3d 1396, 1397 (11th Cir. 1997). "Final policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to meaningful administrative review." Id. At 1401. "Meaningful review" means the opportunity for meaningful review. See id. at 1402. "[I]t is clear that [officials] do not become final policymakers for [§] 1983 purposes simply because persons who disagree with their decisions have to file an appeal in order to have those decisions reviewed." Id. Under this principle we find Plaintiffs' contention that Bight Management possessed final policymaking authority unpersuasive.

1. BIGHT MANAGEMENT

Section 24 City of Key West Code states the relevant law concerning the final policymaking authority of City Bight Managers. Section 24.03 provides in relevant part:

> The [Key West Bight Management District Board] shall have the following duties:
> (a)(7) Review all conflicts between the manager and tenants; all decisions of the Key West Bight Management District Board regarding the terms and management of rental property and administration of leases shall be final. KEY WEST, FLA., ORDINANCE ch. 93, §. 24 (1996)

The ordinance is clear on its face. "The board shall review all conflicts between the [Bight] manager and tenants." Id. Also Plaintiffs acknowledge that the Board did review two of the Bight Managers' decisions regarding tenant conflicts. Therefore decisions made by the Bight Manager regarding tenant conflicts are subject to meaningful review. Hence the Bight Manager is not the final policymaker with respect to the subject matter in question[1] the Bight Manager's decisions do not trigger municipal liability under section 1983.

2. KEY WEST BIGHT MANAGEMENT DISTRICT BOARD

Plaintiffs contend that municipal liability attached under section 1983 as to two of the Bight Managers' challenged acts that were reviewed and upheld by the Board: (1) eviction of Plaintiffs from the commercial shop and (2) eviction of Plaintiffs' sailboat. Plaintiffs assert that the district court held that Key West Bight Management District Board was the final policymaker. The district court did not so hold. Rather the court ruled that Plaintiffs challenged various decisions made by city officials, not by the reviewing board.

B. POLICY OR CUSTOM

Plaintiffs contend that the City's policies and custom caused civil rights deprivations. For the city to be held liable under the custom or practice prong of Monell a Plaintiff must demonstrate that the alleged constitutional deprivation is so well-settled and pervasive that it assumes the force of law. See Denno v. School Bd. Of Volusia County, Fla.,

1. Plaintiffs contend that Bight Management is the final policymaker regarding availability of dock space to non-tenants. It is not. The City Manager's supervisory authority is over the Bight Manager. See KEY WEST, FLA., ORDINANCE ch. 93, §24 (1996). Since the City Manager supervises Bight Management the decisions of Bight Management are subject to meaningful administrative review. Therefore Bight Management is not the final policymaker regarding availability of dock space to non-tenants.

F.3d 1267, 1277 (11th Cir. 2000). The district court held that Plaintiffs have not presented evidence creating a genuine issue of fact as to a pervasive custom of constitutional deprivations so as to make the City potentially liable under section 1983. The district court did not err in holding that Plaintiffs did not adduce evidence establishing that the alleged constitutional torts resulted from a policy officially adopted by Defendant under the Monell doctrine. Plaintiffs contend that the district court ruled sua sponte on a motion for summary judgement without giving Plaintiffs notice and the opportunity to present evidence. The district court did not err in holding that this contention is wholly without merit.

We hold that Bight Management were not officials vested with final policymaking authority and an unconstitutional custom or practice did not exist. Hence the final issue is moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

Case No. 95-10074-CIV-MOORE

ARNAUD GIRARD and NAJA GIRARD,

CLOSED CIVIL CASE

FINAL JUDGMENT

Plaintiffs,

vs.

THE CITY OF KEY WEST,

Defendant.

_____/

Filed by "s/____" D.C.
NOV 2 2000
Clarence Maddox
Clerk, U.S. Dist. Ct. S.D Fla, Miami

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (DE #117). The Court having entered an Order granting Defendant's Motion, it is

ORDERED AND ADJUDGED that Final Judgment is entered in favor of Defendant and against Plaintiffs Arnaud Girard and Naja Girard.

The Clerk of Court is directed to mark this case CLOSED. All pending motions not otherwise ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 2nd day of November, 2000.

S/: _____
K. MICHAEL MOORE
U.S. DIST. JUDGE

cc: Arnaud Girard, pro se
Naja Girard, pro se
David J. Audlin, Jr., Esq.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

Case No. 95-10074-CIV-MOORE

ARNAUD GIRARD and
NAJA GIRARD,
Plaintiffs,
vs.
THE CITY OF KEY WEST,
Defendant.
_____/

ORDER

Filed by s/_____ D.C.
NOV 1 2000
Clarence Maddox
Clerk U.S. Dist. Ct.
So. Dist. Fla. Miami

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (DE #117), Plaintiffs' Motion for Partial Summary Judgment (DE #124,125), and Plaintiffs' Second Motion for Partial Summary Judgment (DE #133).

UPON CONSIDERATION of the motions, responses, materials submitted, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

Background

On November 14, 1995, Plaintiffs Arnaud and Naja Girard ("Plaintiffs"), proceeding pro se, filed this action against Defendant City of Key West, Florida ("Defendant" or "City") and several City employees in their official capacities alleging deprivation of constitutional rights in violation of 42 U.S.C. sec. 1983 ("Section 1983"). Specifically, Plaintiffs alleged that the City and the individual defendants had violated: (1) their right to equal protection of the laws by refusing to rent dock space to them at the Key West Marina, evicting them from a public dinghy dock, and towing their belongings without proper notice; (2) their right to due process

of the law by depriving Plaintiffs of a liberty interest in access to the dock and a property interest in their personal property without notice or opportunity to be heard; and (3) their First Amendment right to free speech by retaliating against Plaintiffs for organizing a tenants association. Plaintiffs also brought a pendent state law claim alleging that Plaintiff Arnaud Girard had been maliciously arrested and prosecuted without probable cause.

By Order dated April 30, 1996, the Court dismissed with prejudice the equal protection claim, the First Amendment claim, the due process claim involving the deprivation of dock space, and all claims against the individual defendants. The case proceeded to trial on the malicious prosecution claim and the due process claim involving deprivation of property. A jury trial was held before Judge James C. Paine in June 1997, and the jury returned a verdict for Defendant on both claims.

Plaintiffs subsequently appealed the dismissal of their equal protection, First Amendment, and due process liberty interest claims. The Eleventh Circuit affirmed the dismissal of the First Amendment and the due process liberty interest claims, but ruled that the equal protection claim should have been allowed to go forward.

On May 10, 1999, Plaintiffs filed their Second Amended Complaint, alleging: (1) the equal protection claim which the Eleventh Circuit ruled should have been allowed to proceed; and (2) a new First Amendment claim based upon events allegedly occurring after the dismissal of the previous First Amendment claim. By Order dated November 30, 1999, this Court adopted the Report and Recommendation of Magistrate Judge John J. O'Sullivan and denied Defendant's Motion to Dismiss the Second Amended Complaint.

Defendant now moves for summary judgment. In its Motion for Summary Judgment, Defendant contends that there is no municipal liability under Section 1983 in this case

because each of the challenged acts were subject to meaningful administrative review and did not represent official policy. In response, Plaintiffs filed a Motion for Partial Summary Judgment and, three days later, a Second Motion for Partial Summary Judgment.

Discussion

I. Summary Judgment Standard

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56© of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. See Twiss v. Kury, 25 F.3d 1551, 1554 (11thCir. 1994). The moving party has the burden of meeting this exacting standard. See Adickes v. S.H. Kresws & Co., 398 U.S. 144, 157 (1970). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. Id.

In applying this standard, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. See id. However, the non-moving party:

> may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Rule 56(e), Fed. R. Civ. P. "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,252 (1986).

In other words, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. V. Zenith Radio, 475 U.S. 574, 586 (1986). In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. Anderson, 477 U.S. at 254. If the non-movant fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. See id. at 254-55.

Additionally, the non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. V. Catrett, 477 U.S. 317, 322-323 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. See id.

II. Section 1983

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983. In Monell v. Dep't of Soc. Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the United States Supreme Court held that municipalities may not be held liable under Section 1983 on a theory of respondeat superior. Rather, municipalities may only be liable for the execution of a governmental policy or custom. The Monell Court explained:

> [It] is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [section] 1983.

Id. At 694. "A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality ... A custom is a practice that is so settled and permanent that it takes on the force of law." Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (11th Cir. 1997), cert. denied, 522 U.S. 1075, 118 S.Ct. 852, 139 L.Ed.2d 753 (1998) (citations omitted). As the Supreme Court recognized:

> Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality .... Similarly, an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.

Bd. Of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 403-404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (citations omitted). Accordingly, municipalities may be held liable only if constitutional deprivations result from (1) a policy, either officially adopted or created by the actions of an official fairly deemed to represent government policy, or (2) a custom so pervasive and well-settled that it assumes the force of law. Denno v. Sch. Bd. Of Volusia County, Florida, 218 F.ed 1267, 1276 (11th cir. 2000); Sewell, 117 F.3d at 489.

Plaintiffs have not adduced evidence establishing that the alleged constitutional torts resulted from a policy officially adopted by Defendant within the meaning of Monell.[1] Rather than attempting to establish any formally adopted policy, Plaintiffs primarily assert that an illegal governmental policy was established through various actions taken by City officials. Specifically, Plaintiffs allege that their equal protection and First Amendment rights wre violated by the following

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1 While Plaintiffs do allege that the City maintained a policy "not to do business with people suing the City," the City Commission transcripts cited by Plaintiffs as support do not establish the formal adoption of such policy by the City.

incidents: (1) the denial of Plaintiffs' requests for dock space for their private yacht, the "Coco Loco," at a city-owned marina by City "Bight Managers" (also referred to as "Dockmasters"); (2) a Bight Manager's decision to evict Plaintiffs from a dinghy dock in the Key West Bight Marina; (3) a Bight Manager's decision to evict Plaintiffs from commercial shop space; (4) the towing of Plaintiffs' trailer by the City of Key West Police Department, allegedly at the direction of a Bight Manager; (5) a Bight Manager's removal and disposal of Plaintiffs' personal belongings left in a common area in front of their shop at the Key West Harbor; (6) the arrest of Arnaud Girard by the City of Key West Police Department on charges of burglary of the marina bathroom, allegedly at the request of a Bight Manager; and (7) a Bight Manager's decision to evict Plaintiffs' vessel, the "Gaspard." (See Second Amended Complaint).

Section 1983 liability may be premised upon a single illegal act by a municipal officer only when the challenged act may fairly be said to represent official policy, such as when that municipal officer possesses final policymaking authority over the relevant subject matter. In Scala, the Eleventh Circuit held that "[f]inal policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to meaningful administrative review." Id. at 1401. See also Morro v. City of Birmingham, 117 F.3d 508, 514 (11th Cir. 1997), cert. denied, 523 U.S. 1020, 118 S.Ct. 1299, 140 L.Ed.2d 465(1998). As the United States Supreme Court has made clear, the issue of whether city officials are final policymakers, so as to trigger municipal liability under Monell, presents a question of law:

> [T]he identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury.

> Reviewing the relevant legal materials, including state and local positive law, as well as custom or usage having force of law, the trial judge must identify those officials or governmental bodies who speak with the final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737, 109 S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989) (citations omitted); Scala, 116 F.3d at 1398 (quoting Jett).

Section 24 of the City of Key West code sets forth the relevant law concerning the final policymaking authority of City Bight Managers. Section 24.03 provides in relevant part:

> The [Key West Bight Management District Board] shall have the following duties:
>
> ***
>
> (a)(11) The board shall review all conflicts between the manager and tenants; all decisions of the Key West Bight Management District Board regarding day to day operation of the Key West Bight Marina, the terms and management of rental property and administration of leases shall be final.

Based upon review of these provisions of the Key West Code, the court concludes that any decision made by a Bight Manager was subject to meaningful review by the Key West Bight Management District Board. Accordingly, any decision made by a Bight Manager cannot trigger municipal liability under Section 1983, as explained in Monell, as the Bight Manager does not have final decisionmaking authority.

In their motions for summary judgment, Plaintiffs contend that the Bight Managers' denial of their request for dock space and decision to evict them from a dinghy dock was confirmed by the Acting City Attorney, who acted with final policymaking authority on behalf of the City. (See Exhibits 4 and 5 to Plaintiffs' Motion for Partial Summary Judgment). However, the fact that the Acting City Attorney communicated the decisions made by the Bight Managers to Plaintiffs did not negate their opportunity to have the decisions reviewed by the Key West Bight Management District Board.

Plaintiffs also contend the municipal liability under Section 1983 attaches as to two of the challenged acts, the bight Manager's decision to evict Plaintiffs from their commercial shop space and eviction of the "Gaspard," because these decisions were actually reviewed by Key West Bight Management District Board, and thus, the decisions were made by a final policymaker. However, Plaintiffs have challenged various decisions made by city officials, not by the reviewing board. Thus, the relevant inquiry under Scala is whether meaningful review of the officials' decisions was available. See Scala, 116 F.3d at 1403 (holding no municipal liability based upon finding that city officials were not final policymakers with respect to employment termination decisions at municipal fire department where the decisions were reviewed by the city civil service board). See also Morro, 117 f.3d at 514 (applying Scala and stating in dicta that, had the city preserved the issue for trial, officials would not be final policymakers because their decision was reviewed by the county personnel board).[2] The fact that the Key West

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2. The court notes criticism of the holding in Scala insulating a city from liability under Section 1983 when an municipal officials's decision is reviewed by a city-affiliated board. See Vincent v. City of Talladega, 980 F.Supp. 410, 418-19(N.D. Ala 1997) (questioning Scala's rule that review by a city-affiliated board can truly provide "meaningful review"). Nonetheless, this court

Bight Management District Board actually reviewed the Bight Managers' decisions supports the conclusion that the Bight Managers do not have final policymaking authority.[3]

As relates to the towing of Plaintiffs' trailer and the arrest of Plaintiff Arnaud Girard by the Key West Police, the record indicates that such decisions were made by individual police officers. However, nothing in the record establishes that individual police officers in the Key West Police Department had the authority to establish final policy for the City with regard to arrests and decisions to tow property. Rather, such decisions are reviewable by the police officers' chain of command, up to the Chief of Police, as well as by the City Manager. (See Affidavit of John Jones ¶ 4 and attached Exhibits A (Key West Police Directives Manual) and B(Article IV of the Key West Code)). To the extent that Plaintiffs allege that the police officers performed the challenged acts at the direction of Bight Managers, the Court has previously concluded that Bight Managers do not have final policymaking authority.

Finally, the Court finds that Plaintiffs have not presented evidence creating a genuine issue of fact as to a pervasive custom of constitutional deprivations so as to make the City potentially liable under Monell. In order to establish municipal liability under the custom prong of Monell, Plaintiffs must demonstrate that their alleged constitutional

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concludes, as did the court in Vincent, that Scala is the law of the Eleventh Circuit and binds this Court's decision.

3. The fact that the other challenged decisions were not reviewed by the Key West Bight Management district Board does not change this Court's conclusion. The Eleventh Circuit equates "meaningful review" with the opportunity for meaningful review. See Scala, 116 f.3d at 1402 ("[I]t is clear that [officials] do not become final policymakers for [Section] 1983 purposes simply because persons who disagree with their decisions have to file an appeal in order to have those decisions reviewed").

deprivations resulted from a custom within the City so well-settled and pervasive that it assumes the force of law. Denno, 218 F.3d at 1277; Sewell, 117 F.3d at 489. That is, Plaintiffs must demonstrate a "persistent and widespread practice" of constitutional deprivations about which the City knew or of which practice it had constructive knowledge. Denno, 218 F.3d at 1277.

In its motions for partial summary judgment, Plaintiffs make numerous allegations in support of their contention that the City ratified a widespread practice of constitutional deprivations by its officials. First, Plaintiffs allege that City officials acted according to a policy of "not doing business with people suing the City," which was "reaffirmed several times at City commission meetings" (Plaintiffs Opposition, Part I, at 7). However, even assuming that the transcripts cited by Plaintiffs supported the existence of such informal policy, Plaintiffs have failed to establish that the City officials, in making the challenged decisions, acted pursuant to such policy, or more importantly, that any final policymaker knew that the officials were acting pursuant to such policy. That is, Plaintiffs have failed to demonstrate that a custom or policy of not doing business with people suing the City was the "moving force" behind the alleged constitutional deprivations. Monell, 436 at 690-94. Plaintiffs' conclusory statement that "four consecutive Dockmasters carried out the same type of actions with the same discriminatory animus" (Plaintiffs' Opposition, Part II, at 2) does not establish such knowledge by the City. Furthermore, while Plaintiffs contend that other people have complained to the City of unequal treatment and free speech retaliation (Plaintiffs' Exhibits 28,29,and 30), Plaintiffs have not presented any evidence that the City or any of its final policymakers had knowledge of a "persistent and widespread practice" of constitutional deprivations through such complaints. Finally, Plaintiffs' unsupported allegation of the City's "deliberate indifference regarding policies in training of employees in matters of equal protection and [F]irst

[A]mendment rights" (Plaintiffs' Opposition, Part II, at 1) is not sufficient to create a genuine issue of fact as to a pervasive custom of constitutional deprivations.

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED THAT Defendant'S Motion for Summary Judgment (DE #117) be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' Motion for Partial Summary Judgment (DE #124,125) and Plaintiffs' Second Motion for Partial Summary Judgment (DE # 133) are DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of November, 2000.

S/:_____

K. MICHAEL MOORE
U.S. DIST. JUDGE

cc: Arnaud Girard, pro se
Naja Girard, pro se
David J. Audlin, Jr., Esq.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-10074-CIV-PAINE

ARNAUD GIRARD and
NAJA BISSAR,
Plaintiffs,

vs.

THE CITY OF KEY WEST,
MARC SUMMERS,
LESLIE DOUGALL-SIDES,
FINDLAY SINCLAIR and
EDWARD SCHERDIN,
DONNA WAGNON, and
ROBERT WINTERBOTTOM,
Defendants.

_____/

FILED by _____ D.C.
APR 30 1996
Carlos Juenke
Clerk U.S. Dist. Ct.
S.D. of FLA, WPB

ORDER ON DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

This matter is before the court upon the Defendants' Motion to Dismiss the Amended Complaint which was filed pursuant to leave of court, upon dismissal of the Original Complaint without prejudice.

On consideration of a Motion to Dismiss, all well pled allegations of the complaint must be taken as true and construed favorably to the pleader. Schuer v. Rhodes, 416 U.S. 232, 236 94 S.Ct. 1683, 1686 (1974); Jacobs v. Board of Regents, 473 F. Supp 663 (S.D. Fla. 1979). Consideration of matters beyond the four corners of the complaint is improper in the context of a motion to dismiss. Milburn v. United States, 734 F.2d 762 (11th Cir. 1984). The rules of pleading

under the Federal Rules of Civil Procedure are very liberal. Rule 8(a) merely requires that the complaining party provide

> (1) a short plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it (2) a short, plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Under the standard established by Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957), a motion to dismiss should not be granted unless the Plaintiff can prove no set of facts in support of his claim entitling him to relief.

Further, pro se complaints are not held to stringent standards expected of pleadings drafted by lawyers. In contrast, pro se complaints are to be liberally construed. Haines v. Kerne, 92 S.Ct. 594, 595 (1972).

COUNT I – EQUAL PROTECTION

In Count I, the Plaintiff's claim that the city of Key West's refusal to grant them dock space at the Key West Bight constituted a deprivation of equal protection under the law. However, just as in the original Complaint, there is absolutely no allegation in this Complaint that these Plaintiffs are members of a suspect, protected class. When state action does not affect a suspect class, courts presume that the action is valid and only find it unconstitutional when the state action lacks any relation to a permissible government objective. Kite v. Marshall, 661 F.2d 1027, 1030 (5th cir. 1981), cert. Den., 102 S.Ct. 2934.

The Plaintiffs have also not alleged that any of the city of Key West laws affecting Plaintiffs in the complained of situations is discriminatory. The controlling law provides that a plaintiff who alleges that a governmental agency unequally applied a facially neutral law is required to show intentional discrimination to be successful on his equal protection claim.

E&T realty v. Strickland, 830 F.2d 1107 (11th Cir. 1987).

Because the Plaintiffs have, on two occasions, attempted but failed to allege a sustainable equal protection claim, Count I must be dismissed with prejudice.

COUNT II – DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

Generally, a §1983 cause of action lies against a Defendant who, acting under color of state law, deprives a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Bendiburg v. Dempsey, 909 f.2d 463, 468 (11th Cir. 1990). The two elements a plaintiff must allege in bringing an action under §1983 are: 1) that the conduct complained of was committed by a person acting under color of state law; and 2) that this conduct deprived a person of rights, privileges, or immunities secured by the constitution of the United States. Adickes v. S.H. Kress & Co., 90 S.Ct. 1598, 1604 (1970). However, in an action like the present action, against a municipality, the Plaintiff must also plead and prove that official custom or policy was the moving force behind the constitutional violation. Monell v. Department of Social services, 98 S.Ct. 2018 (1978). The law is clear that a municipality may not be held liable under §1983 on a respondeat superior theory. Id.; Brown v. city of Fort Lauderdale, 923 F.2d 1474, 1479 (11th Cir. 1991). Further, because a municipality may only be liable for "acts which the municipality has officially sanctioned or ordered," Pembaur v. City of Cincinnati, 106 S.Ct. 1292, 1298 (1986), its liability can never be premised on the result of a random and unauthorized act. To establish the existence of a practice or custom:

> it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom or policy.

Depew v. City of St. Mary's, 787 F.2d 1496, 1499 (11th Cir. 1986). Proof of a single incident of unconstitutional activity is not sufficient to impose liability. City of Oklahoma city v. Tuttle, 105 S.Ct. 2427 (1985) (plurality opinion).

Therefore, the court must evaluate the present Amended Complaint for the existence of facts and allegations to support the finding of 1) color of state law; 2) deprivation of rights; and 3) official custom or policy.

In Count II, the Plaintiffs claim that the actions of the City of Key West, through its employees, constituted a deprivation of property without due process of law as guaranteed by the Fourteenth Amendment of the Constitution. The Plaintiffs Amended Complaint addresses the deprivation of their personal property without notice on several occasions. The Constitution provides that "[N]o State [shall] deprive any person of life, liberty, or property, without due process of law." This clause applies to states and their political subdivisions through the Fourteenth amendment. See Wheeler v. Pleasant Grove, 833 F.2d 267, 270 n.3 (11th Cir. 1987), reh. den. 844 F.2d 794 (1988) (en banc). Of course, the Plaintiffs' personal belongings disposed of by city employees, falls under the rubric of "property" governed by the due Process clause. The constitution guarantees that a person cannot be deprived of property except pursuant to constitutionally adequate procedures. Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1493 (1985). Those guarantees require notice and an opportunity to be heard. Mullane v. central Hanover Bank & Trust Co., 70 S.Ct. 652, 656-57 (1950). Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." Mullane, 70 S.Ct. At 657.

In the present case, the Plaintiff alleges that on at least 4 occasions (more than a single, isolated incident), the management of the Key West Bight disposed of property

belonging to the Plaintiffs and that the disposal was without notice. The City cannot be held liable under §1983 if the acts of deprivation were isolated and apparently random acts against the Plaintiffs. However, reviewing count II of the amended Complaint in light of the relaxed standard which is to be applied to pro se complaints, the court finds sufficient allegations that the acts of deprivation were taken by City employees, through a policy or custom of the city, or were, at least, authorized by the City's governing authority. Accordingly, Defendants' Motion to Dismiss Count II must be denied.

COUNT III – ARREST AND PROSECUTION WITHOUT PROBABLE CAUSE

This claim, a claim for malicious prosecution, has already been determined by the court to be sufficient as alleged against the City of Key West. See, Court's Discussion of count I of original complaint. Accordingly, inasmuch as the Defendant city has failed to raise any new grounds for dismissal, the city's Motion to Dismiss Count III must be denied. Regarding liability of the individual Defendant, see discussion, infra.

COUNT IV – VIOLATION OF SPEECH AND FREEDOM OF ASSOCIATION

In Count IV the Plaintiffs again seek redress for alleged constitutional violations, this time based upon First Amendment (freedom of speech). The first Amendment provides that congress shall make no law abridging the freedom of speech. Through the Fourteenth Amendment, The First Amendment is applicable to the states. The Plaintiffs do not allege that the city of Key West has in place any law that works to abridge the Plaintiffs' Freedom of Speech. Therefore, as stated in this court's previous order, the facts as alleged, even when accepted as true, would not support a finding of liability against the City for violations of the Plaintiffs' first Amendment rights. Accordingly, Count IV

must again be dismissed. The facts concerning retaliation and prosecution without probable cause, are redressed in Count III in which the Plaintiff claims malicious prosecution and do not constitute a First Amendment claim. Accordingly, Count IV will be dismissed.

The Individual Defendants

The style of the Amended Complaint names, in addition to the city of Key West, Defendants Mark Summers, the City's Bight Dockmaster; Leslie Dougall-Sides, acting City Attorney at the time of the incident; Findlay Sinclair, the City's Bight Manager; and Edward Scherbin, the City's Bight Dockmaster; and Donna Wagnon and Robert Winterbottom, police officers. In the Amended Complaint, the Plaintiffs demand damages against these individual Defendants.

Under §1983, individuals may be held liable for otherwise governmental actions where those individuals violate the federal Constitution, and Plaintiffs seek a nominal damage remedy. See Scheuer v. Rhodes, 416 U.S. 232 (1974). Therefore, the court must consider the substance of Plaintiff's §1983 claim to determine liability.

A review of the Complaint reveals that the Plaintiffs have identified the individual Defendants as "City Officials" and further allege that each took action against the Plaintiffs in their official capacity. Specifically, the essence of the Plaintiffs' Amended Complaint remains to be that the Defendants unlawfully took possession and disposed of Plaintiff's property, without due process of law. There is no factual allegation in the Complaint which would support a finding that these individuals took action against these Plaintiffs which was either beyond the scope of their employment or which was so arbitrary so as to constitute gross abuse of the lawful powers of office. Likewise, because there are no factual allegations that these individual Defendants acted in a manner exhibiting wanton and willful disregard of human rights, safety or property, they are

shielded from individual liability on the state law claims by Florida Statute 768§.28(9)(a). Accordingly, the Amended Complaint against the individual Defendants must be dismissed with prejudice, for failure to state any claim against them in their individual capacities.

In view of the foregoing, it is

ORDERED and ADJUDGED that the individual Defendants' Summers, Dougall-Sides, Sinclair, Scherbin, Wagnon, and Winterbottom's Motion to Dismiss is GRANTED. The Complaint is dismissed as to these Defendants in their individual capacities, with prejudice. It is further

ORDERED and ADJUDGED Defendant City of Key West's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART. It is denied as to Counts II and III and granted as to Counts I and IV. Counts I and IV are dismissed with prejudice. Within 10 days of the date of this order, the Defendant City of Key West shall file an Answer to the remaining counts of the Amended Complaint. For clarification, the present case is a two-count complaint for deprivation of property without due process of law (premises solely upon the Defendant's alleged confiscation and destruction of Plaintiffs' personal property), and a pendent state claim for malicious prosecution. The City of Key West is the only remaining Defendant. All discovery and substantive issues shall be limited to these two claims and this single Defendant. All discovery and substantive issues shall be limited to these two claims and this single Defendant and the factual allegations relating to the dismissed claims are not relevant and need not be proved at trial.

DONE and ORDERED at West Palm Beach, Florida, this 30th day of May, 1996.

S:_____
JAMES C. PAINE
U.S. DISTRICT JUDGE

Copies furnished to:

Diane Tolbert Covan
City Attorney
P.O. Box 1409
Key West, FL 33040

Arnaud Girard and Naja Bissar
P.O. Box 6263
Key West, FL 33041

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-10074-CIV-PAINE

ARNAUD GIRARD and
NAJA BISSAR,
Plaintiffs,

vs.

THE CITY OF KEY WEST,
MARC SUMMERS,
LESLIE DOUGALL-SIDES,
FINDLAY SINCLAIR and
EDWARD SCHERDIN,
DONNA WAGNON, and
ROBERT WINTERBOTTOM,
Defendants.

_____/

FILED BY___D.C.
MAY 14 1997
Carlos Genk
Clerk U.S. Dist. Ct.
S.D. of FLA WPB

ORDER ON DEFENDANTS' MOTION TO STRIKE, SECOND MOTION TO DISMISS AMENDED COMPLAINT, AND MOTION FOR SUMMARY JUDGMENT

This matter is before the court upon the Defendants' Motion to Strike, Motion to dismiss and Motion for summary Judgment (DE 39-1 (DE39-2) (DE 39-3). The Plaintiff conceded that, as a pro se litigant, he is not entitled to an award of attorneys' fees unless he actually retains a lawyer. Accordingly, Defendant's Motion to Strike Plaintiff's claim for attorneys' fees will be granted.

On consideration of a Motion to Dismiss, all well pled allegations of the complaint must be taken as true and construed favorably to the pleader. Scheur v. Rhodes, 416

U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974); Jacobs v. Board of Regents, 473 F. Supp 663 (S.D. Fla. 1979). Consideration of matters beyond the four corners of the complaint is improper in the context of a motion to dismiss. Milburn v. United States, 734 F.2d 762 (11th Cir. 1984). The rules of pleading under the federal Rules of civil Procedure are very liberal. Rule 8(a) merely requires that the complaining party provide

> (1) a short plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it (2) a short, plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Under the standard established by Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957), a motion to dismiss should not be granted unless the Plaintiff can prove no set of facts in support of his claim entitling him to relief.

Further, pro se complaints are not held to stringent standards expected of pleadings drafted by lawyers. In contrast, pro se complaints are to be liberally construed. Haines v. Kerner, 92 S.Ct. 594, 595 (1972).

COUNT II–DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

Generally, a §1983 cause of action lies against a Defendant who, acting under color of state law, deprives a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Bendiburg v. Dempsey, 909 f.2d 464, 468 (11th Cir. 1990). The two elements a plaintiff must allege in bringing an action under §1983 are:

1) that the conduct complained of was committed by a person acting under color of state law; and 2) that this conduct deprived a person of rights, privileges, or immunities

secured by the constitution of the United States. Adickes v. S.H. Kress & Co., 90 S. Ct 1598, 1604 (1970). However, in an action like the present action, against a municipality, the Plaintiff must also plead and prove that official custom or policy was the moving force behind the constitutional violation. Monell v. Department of social Services, 98 S.Ct. 2018 (1978). The law is clear that a municipality may not be held liable under §1983 on a respondeat superior theory. Id.; Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1479 (11th Cir. 1991). Further, because a municipality may only be liable for "acts which the municipality has officially sanctioned or ordered," Pembaur v. City of Cincinnati, 106 S.Ct. 1292, 1298 (1986), its liability can never be premised on the result of a random and unauthorized act. To establish the existence of a practice or custom:

> it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom or policy.

Depew v. City of St. Mary's, 787 f.2d 1496, 1499 (11th Cir. 1986). Proof of a single incident of unconstitutional activity is not sufficient to impose liability. City of Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985) (plurality opinion).

Pursuant to the aforementioned authority and upon evaluation of the Amended Complaint, this court previously held that the Plaintiff's allegations that on at least 4 occasions (more than a single, isolated incident), the management of the Key West Bight disposed property belonging to the Plaintiffs and that the disposal was without notice were sufficient allegations of acts of deprivation taken by City employees, through a policy or custom of the city, or were, at least authorized by the City's governing authority. Accordingly, the court found that the allegations of the complaint, when accepted as true, constituted enforcement of an established

municipal procedure and were not random, unauthorized acts.

The Defendant now seeks dismissal of count I on the grounds that the Plaintiff failed to properly allege that state procedures available for challenging the alleged deprivation do not satisfy due process. Generally, there is no requirement that state judicial remedies be exhausted prior to the institution of a federal court§1983 action. In Monroe v. Pape, 365 U.S. 167, 183 (1961), the Supreme Court ruled that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[1] In Board of Regents v. Tomanio, 446 U.S. 478,491 (1980), the Court cited Monroe and again stated that "[t]his Court has not interpreted §1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section." Id. See also Majette v. O'conner, 811 F.2d 1416 (11th Cir. 1987) ("exhaustion of state administrative remedies is not a prerequisite to bringing a §1983 action."

The authority cited by the Defendant in this case for the proposition that the existence of an available state remedy, coupled with the Plaintiff's failure to pursue same, warrants dismissal of the §1983 claim is misapplied under the facts as alleged by this Plaintiff. Under the Parratt v. Taylor 451 U.S. 527 (1981) doctrine, as extended by the Court in Hudson v. Palmer, 468 U.S. 517 (1984), when a plaintiff alleges a violation of the due process clause of the fourteenth Amendment as a result of a "random and unauthorized act" rather than, as in the present case, the enforcement of an "established state procedure," the claim may be defeated on its merits if there exists postdeprivation state judicial

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1.Although the Court, in Monell v. Department of Social Services, 436 U.S> (1978) overturned that part of Monroe that held that municipal bodies were not subject to §1983 liability, Monell did not disturb the holding in Monroe that state judicial remedies need not be exhausted before commencement of a federal court § 1983 action.

procedures which satisfy due process. In the present case, the Plaintiff has not alleged isolated random or unauthorized acts but rather has alleged a concerted and established policy of the City of Key West to deprive him of his property without affording him due process. Accordingly, there is no requirement that this Plaintiff under these circumstances, pursue state judicial remedies prior to seeking redress pursuant to Section 1983. Under the well established rule set forth in Monroe, this Plaintiff has an absolute right to commence a federal court §1983 action without exhausting state judicial remedies.

Regarding the Defendant's second assertion that summary should be entered in its favor because the Plaintiff has admitted that the value of the personal property taken is only $350.00, the court finds that the Plaintiff's answer to the interrogatory also states that he is entitled to $30,000 in intangible compensatory damages. Accordingly, it cannot be said that there is no genuine issue of material fact that the value of this case is de minimus the amount of damages in this case is for the jury to determine. Accordingly, Defendants' Motion to Dismiss and Motion for Summary Judgment on Count II must be denied.

COUNT III–ARREST AND PROSECUTION WITHOUT PROBABLE CAUSE

This claim, a claim for malicious prosecution, has already been determined by the court to be sufficient as alleged against the City of Key West. See, Court's discussion of Count I of original complaint. Because the Plaintiff did not identify the legal basis upon which was proceeding in this Count entitled only "Arrest and Prosecution Without Probable Cause" and further because in his memorandum of law in opposition to the Motion to dismiss, he referred to the state claim of false imprisonment and never mentioned in reference

to that claim a §1983 deprivation, the court analyzed the claim to determine if the facts alleged sustained a cause of action under any claim and determined that the facts alleged a cause of action for malicious prosecution. Under that standard, the court determined that the individual Defendants who were acting within the course and scope of their employment as City employees, were shielded from individual liability, pursuant to Florida Statute §769.28(9)(a).[2]

Although the Defendant City has not raised the issue of §769.28 sovereign immunity on the merits in its most recent Motion to Dismiss, the Plaintiff has asked for clarification of the standard in light of this court's previous orders. For purposes of saving time during trial, the court will clarify the applicable standard. The claim for malicious prosecution and/or §1983[3], remains pending solely against the City. Accordingly, pursuant to §768.28, liability may only attach if the complained-of acts by the individual employees were not taken in bad faith or with malicious purpose. As previously noted regarding the element of malice in a

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2. For purposes of analyzing the still pending §1983 claim alleged in Count II, the court likewise determined that the individual Defendants were not subject to §1983 liability because the facts of the amended Complaint did not support a finding that the individuals were acting outside the scope of their employ as city officials. Accordingly, the standard for purposes of establishing individual and municipal liability, is a mere distinction without a difference in the ultimate outcome.

3. Because none of the pretrial rulings would differ and further because the Defendant has been aware of the facts underlying this claim throughout the litigation, and the facts support a cause of action under either theory, the court will permit the Plaintiff, if he chooses, to submit this claim to the jury as a §1983 claim against the City instead of a malicious prosecution claim. Under §1983, the claim against the City is not barred by respondeat superior because the Plaintiff challenges the established policy of the City as effected by its employees in the course and scope of their employment; the employees are still immune from individual suit because they were acting within the scope of their employment. Further, the Amended Complaint alleges a warrantless seizure without probable cause, a valid basis for a §1983 claim.

malicious prosecution case, it is not necessary for the Plaintiff to prove actual malice; legal malice is sufficient and may be inferred from, among other things, lack of probable cause, gross negligence, or great indifference to persons, property, or rights of others. Alamo Rent-a-Car, Inc. v. Mancusi, 632 So.2d 1352 (Fla. 1994). In the present Complaint, where the Plaintiff Girard alleged that he was arrested and taken to jail on a felony charge of burglary, that the Defendant city, through its policy, officials and police, was the legal cause of origin of the proceeding against him, that the presiding judge found no probable cause and released him, thereby terminating the criminal proceeding in his favor, this court inferred malice from the allegation of lack of probable cause and denied the Motion to Dismiss. Accordingly, if the jury at trial finds as a matter of fact that the Plaintiff's arrest was without probable cause, malice on the part of the City itself through the concerted efforts of its employees who were acting, as the Plaintiff alleges, pursuant to established City policy, may be inferred. Accordingly, a finding of liability against the City on the malicious prosecution claim which is premised upon employees' actions which resulted in Plaintiff's arrest without probable cause, does not automatically establish sovereign immunity under §768.28. Quite simply, the city cannot have it both ways–they cannot insulate the individuals from liability under §768.28 because they did not act individually in bad faith or with malicious purpose, and at the same time insulate the City from liability because the individuals acted in bad faith or with malicious purpose. Accordingly, for clarification of both parties, this pendent state claim for malicious prosecution, unless replaced by Plaintiff's election to proceed under §1983, remains pending against the City of Key West which is not endowed with immunity through the beyond-the scope provision of Fla. Stat. §768.28.

The Defendant also seeks dismissal of Count III on the grounds that the limited waiver of sovereign immunity set

forth in §768.28 requires that "an action may not be instituted against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency." Fla. Stat. §768.28(6)(a). In Hattaway v. McMillan, 903 F.2d 1440 (11th cir. 1990), faced with a Plaintiff who failed to comply with Florida's notice requirement, this Circuit affirmed a district court's refusal to dismiss Plaintiff's claim on this ground. In so holding the court quoted with approval the holding in Fitzgerald v. McDaniel, 833 f.2d 1516 (11th Cir. 1987), wherein the court refused to dismiss a complaint for failure to strictly comply with the condition precedent notice requirements of Fla. Stat. §768.28(6) because

> ... it would serve no useful purpose to dismiss the complaint, for such a dismissal clearly must be without prejudice and with leave to amend. [footnote omitted.]... I note that if the defendants were able to articulate some actual prejudice that resulted from the Plaintiff's failure [to strictly comply with the notice requirement] before filing suit, I would be more inclined to dismiss the case and require the plaintiff to comply strictly with the language of Section 768.28.

Hattaway, 903 f.2d at 1446, quoting Fitzgerald, 833 F.2d at 1520 n.2 (quoting district court's order). In the present case, like in Hattaway and Fitzgerald, the court finds that it would serve no purpose to dismiss this action and to require refiling after written notice to the City is given. However, the Plaintiff is hereby notified that at the soonest possible time after receipt of this order and prior to trial, he shall give written notice to the City of Key West of this claim. During his case in chief, the Plaintiff shall further be required to present evidence that he complied with the notice requirement. The claim shall be deemed denied by the City at the time of the commencement of trial, unless settlement is effected. If the Plaintiff proceeds under the malicious prosecution theory and not under Section 1983, his failure to

establish that he satisfied the notice requirement as ordered by this court, will result in a dismissal of this claim with prejudice. See Hardcastle v. Mohr, 483 So. 2d 874 (Fla. Dist. Ct. App. 1986) (judgment against Plaintiff on the merits is required where Plaintiff chose to present his case at trial without having established the notice requirement). While this procedure is not a strict application of the notice requirement, it is fair to all parties. It simply cannot be said on this record that the City, who has participated in this litigation, including investigation and discovery of the claim, for two years without objecting to the lack of prior written notice until the eleventh hour, suffered any prejudice by Plaintiff's failure to give prior written notice of the claim.

Further, the court alternatively finds that the Defendant has waived the lack of notice defense because it failed to plead the notice requirement as an affirmative defense in its answer or in either of the two previous motions to dismiss. The court rejects the Defendant's belated technical objection for failure to give written notice because the city has litigated the case for two years without voicing this curable defect until just before trial. Notwithstanding this basis for waiver, the court will require the Plaintiff, for purpose of satisfying the spirit of the statute and preserving his claim, to establish notice on the more lenient terms set forth above.

In view of all of the foregoing, it is

ORDERED and ADJUDGED that Defendant's Motion to Strike, Dismiss and for Summary Judgment (DE 39-1, DE 39-2, DE 39-3) is GRANTED in part and DENIED in part. The claim for attorney's fees is STRICKEN, the Motion is DENIED in all other respects. Trial of this case shall proceed as scheduled against the City on Count II (§1983 Deprivation of Property Without Due Process) and Count III (Malicious Prosecution or §1983 (Warrantless Seizure Without Probable Cause). No further pre-trial motions will be heard.

DONE and ORDERED at West Palm Beach, Florida, this 14th day of May 1996.

S:/_____

JAMES C. PAINE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16404-DD

ARNAUD GIRARD,
NAJA BISSAR,
Plaintiffs-Appellants,
versus
CITY OF KEY WEST,
MARC SUMMERS, ET AL.,
Defendants-Appellees.

Filed
U.S. Court of Appeals
Eleventh Circuit
JUL 15 2003
Thomas K. Khan
Clerk

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: EDMONDSON, Chief Judge, WILSON and GODBOLD, Circuit Judges.

BY THE COURT:

Appellants Girard and Bissar ("Girards") filed a 42 U.S.C. § 1983 action against the Defendants, the City of Key West and several City employees in their official capacities. The Defendants moved for summary judgment. The district court found that each of the acts challenged by the Girards was subject to meaningful administrative review and represented neither officially policy nor actionable custom. The court held that there was no municipal liability under § 1983 and granted the defendants' motion. The Girards appealed. We affirmed. The Girards filed a motion for rehearing.

We directed the parties to brief the specific issue of whether Bight Managment is the final policymaker regarding the availability of dock space to non-tenants under the 1994 Key West, Florida City Ordinance. The parties have briefed the issue.

We have examined the 1994 ordinance. Pursuant to its provisions the City Manager supervises Bight Management's decisions, therefore Bight Management is not the final policymaker regarding availability of dock space to non-tenants.

Appellants' motion for rehearing is DENIED.

U. S. COURT OF APPEALS for the 11th Circuit
GIRARD V. THE CITY OF KEY WEST
No. 00-16404
October 25, 200

Arnaud GIRARD,
Naja BISSAR,

Plaintiffs-Appellants,

versus
CITY OF KEY WEST,
MARC SUMMERS,
LESLIE DOUGALL-SIDES,
FINDLAY SINCLAIR,
EDWARD SCHERBIN, a.k.a. Edward Scherdin,
DONNA WAGNON,
ROBERT WINTERBOTTOM.

Defendants-Appellees.

Filed
October 25 2001
Thomas K. Khan
Clerk

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Issued as Mandate
July 23, 2003
Clerk
U.S. Court of Appeals
Atlanta, GA

Entered: October 25, 2001
For the Court: Thomas K. Kahn,

By: McCombs, Elaine

APPENDIX G

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

APPENDIX H

ORDINANCE NO. 93-24

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF KEY WEST CREATING CHAPTER 24.00 OF THE KEY WEST CODE OF ORDINANCE; ADOPTING A CHARTER FOR THE ESTABLISHMENT OF THE KEY WEST BIGHT MANAGEMENT DISTRICT; PROVIDING FOR EXISTENCE, ESTABLISHING DUTIES, POWERS AND AUTHORITY; PROVIDING FOR MEMBERSHIP AND TERMS; PROVIDING FOR APPEALS; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

WHEREAS, by Resolution No. 92-400 the City Commission of the City of Key West adopted the recommendations of the Trust for Public Land Advisory Council concerning the management, preservation and redevelopment of the City's property at Key West bight; and

WHEREAS, by Resolution No. 92-400 the City Commission specifically adopted the four concepts below as guiding principles in the ownership and operation of the City's property at Key West Bight:

1. Commitment to Private Management
2. No city Involvement in Setting Rents
3. No Use or Pledge of Property Taxes
4. Oversight by an Independent Board; and

WHEREAS, the City Commission of the City of Key West charges the Key West Bight Management District Board to carry out the intentions of Resolution 92-400 insofar as those recommendations are consistent with federal laws, state law, the City Charter and Code and the covenants of the Key West Marina/conservation bond; and

WHEREAS, the ownership and leasing of the commercial property and the management of the public marina and fuel dock at Key West Bight must be consistent with federal law, state law, the City of Key West Charter, Code of Ordinance and the Marina/Conservation bond covenants; and

WHEREAS, the City Commission can best provide for sound business practices in the management and operation of the City Marina and upland leases by providing for oversight by an non-elected oversight board; and

WHEREAS, the City of Key West by virtue of Chapters 166, and 189 of the Florida Statutes has the power and authority to create a dependent district for Key West Bight and appoint an oversight board for the management of the Key West Bight; and

WHEREAS, the creation of a Key West Bight Management District will serve a public purpose by vesting authority in the appointed members of the Management District to oversee the manager of the Key West Bight in the performance of day to day duties as well as the implementation of long term plans; and

WHEREAS, the proper management, preservation and redevelopment of the City's property at Key West Bight will benefit the tenants of the Bight and all of the citizens of Key West, and provide further for the general health safety and welfare of the community;

NOW THEREFORE, BE IT ENACTED by the City Commission of the City of Key West, Florida as follows that the following Chapter 24.000 of the Key West Code of Ordinances is hereby created and the Charter for the Key West Bight Management District is hereby adopted as follows:

Section 1. Chapter 24.00 Code of Ordinances, City of Key West, Florida is hereby created to read as follows:

24.00 KEY WEST BIGHT MANAGEMENT DISTRICT; BOARD

24.01 Definitions

As used in Sections 24.01 through 24.10 inclusive the following words shall have the meaning ascribed thereto:

Accounting - a certified public accountant

Banking- an executive officer of a banking institution

Board - the appointed members of the seven member Key West Bight Management District

Chamber of Commerce - a member of the chamber of Commerce endorsed by its board.

Commission - the elected seven member City Commission for Key West.

Historic Preservation - a board member, or a past board member or current <u>or former</u> Executive director of any group or organization whose purpose is primarily to study, preserve, protect or encourage historic preservation in Key West.

Legal - a person having graduated from an accredited law school in good standing with the Florida Bar or Bar of another State.

Manager - any person(s) whether natural or corporate who has the following contractual duty which includes, but is not limited to management of the City owned Key West Bight real property, including the marina, to prepare an annual budget and business plan, to negotiate lease terms first with existing tenants and set market rental amounts, (subject to Board approval) to collect rental payments and remit same to city, and the development of rules and regulations for the marina and uplands, and any other duties or responsibilities assumed by the manager by contractual agreement.

Maritime - a person ~~involved in~~ with professional maritime experience ~~activity.~~

Real estate - a person with experience in property management engaged as a licensed real estate broker, or state licensed real estate appraiser.

Supermajority - a vote equal to a simple majority vote ;plus one vote, regardless of the number of Commission members present and voting.

Tenant - any person(s) whether corporate or natural having the legal right to occupy the City property at Key West Bight regardless of status as a tenant or subtenant of the property as of May 24, 1993.

Sec. 24.02 Findings; purpose; Board created.

(a) The City Commission hereby finds that the management, preservation, and redevelopment of the Key West Bight property owned by the City of Key West is a public purpose, and further finds that said public purpose can be best achieved by creating the Key West Bight Management District Board having the power and duty to oversee the management preservation and development of the City's property at Key West Bight for best interest of the City and its citizens.

(b) The City Commission hereby creates the Key West Bight Management District Board (hereinafter Board or KWBMDB), and charges the Board to use the power and authority conferred upon it by the Code of Ordinances to further the purposes expressed herein. The KWBMDB shall consist of a seven member board appointed by the Mayor with consent of the City Commission.

Sec. 24.03 Powers and duties.

The KWBMDB shall have the following duties and

(a)(1) prescribe the duties and responsibilities of the manager,

(2) to hire future manager(s) and negotiate management contracts subject to approval by the City Commission.

(3) to terminate manager(s) manager(s) according to the terms of any contract.

(4) oversee the operation and development of an expanded public marina on the Key West Bight property

(5) supervise the manager in the performance of those duties contracted for by the manager,

(6) facilitate and approve application for all required permits necessary for redevelopment and or expansion of the uplands property and marina.

(7) make application to the Trustees of the Internal Improvement Trust Fund for renewal of all baybottom lease rights and apply for those deemed necessary to carry out marina expansion plans.

(8) identify and recommend grant applications for approval by the City Commission,

(9) review and approve the annual budget and business plan prepared by the Manager prior to submission for approval or disapproval by the City commission (without line item veto),

(10) approve rental rates and lease terms negotiated by the Manager for marina and upland tenants at Key West Bight. All leases shall be consistent with the City

Charter, Code of Ordinances and Marina Bond Covenants.

(11) The Board shall review all conflicts between the manager and tenants. All decisions of the Key West Bight Management district Board regarding day to day operation of the Key West Bight marina, the terms and management of rental property and administration of leases shall be final.

(12) All matters within the Key West Bight subject to review and/or approval by the Community Redevelopment Agency shall be considered by the Board for review and comment only.

(b) On the following matters the Key West Management District Board shall submit ordinances and resolutions to the city commission which shall retain final approval authority on those ordinances and resolutions coming before it;

(1) the Key West Bight Management district budget and annual business plan.

(2) architectural concept, design or plans of redevelopment at Key West Bight,

(3) acquisition and/or sale of real property at Key West Bight

(4) the expenditure of funds in excess of $7,500
(5) transfers of funds from one budget category to another.
(6) The City Commission shall request voter approval on matters of pledging commercial rents and marina revenues for the financing of improvements, expansion or property acquisition at or around the Key West Bight.
(7) The City Commission shall have final review over any matter which may affect the tax exempt status of the marina/conservation bond.

Sec. 24.04 Composition and terms; compensation
The KWBMDB Board shall consist of seven members who shall reside in Key West or have a business or profession located in Key West, and reside in the lower keys (south of the seven mile bridge) who shall be appointed by vote of the city Commission. No voting board member shall have any ownership interest in any business located in the KWBMD or shall be employed by a tenant or ownership interest located in the KWBMD.

The Mayor shall present a slate of nominees to the Commission with not less than 2 nor more than 3 nominees for each discipline to be represented. The nominee from each discipline receiving the highest number of votes shall be appointed. At least one person

with a demonstrated interest in community service from each of the following disciplines shall be represented on the KWBMDB: legal; accounting; banking; historic preservation ; maritime; real estate, Chamber of Commerce.

Appointments shall be made on a staggered basis as follows. Of the initial appointments, three (3) members shall be appointed for a term of two (2) years, and four members shall be appointed for a term of four years. Thereafter, each appointment shall be for a term of four years, except that appointments to replace a vacating member shall be for the unexpired term of said member.

Any member may be removed by the City Commission for cause, which shall include but not be limited to violation of law relating to the member's office. All members shall serve without compensation but, as authorized by the City Commission, may be reimbursed for actual expenses incurred in connection with their duties.

~~Two tenants of the Key West Bight shall sit on the Board as nonvoting members. Nominees shall be submitted at large to the mayor who shall submit six names to the Commission. The nominees receiving the highest and second highest vote shall be appointed to serve terms of two (2) years.~~

The Key West Bight Preservation Association shall appoint two of its members to serve as liaison with the KWBMDB; liaison shall not

The City Commission shall appoint one of its own members to serve as liaison with the KWBMDB; the liaison shall not be a voting member of KWBMDB.

Sec. 24.05 Staff.

The City Manager shall assure that sufficient secretarial support staff is provided to the Board for the execution of its duties, and in order to record and transcribe in summary form, subject to KWBMDB approval, the minutes of all KWBMDB meetings. The city attorney or designee thereof may serve as legal counsel to the KWBMDB.

Sec. 24.06 Organization and rules.

(a) Four members of the KWBMDB shall constitute a quorum for the transaction of business.

(b) From among its members KWBMDB biannually shall elect a chairperson and such other officers as it deems necessary.

©) KWBMDB shall attempt to convene on a regularly scheduled basis at least once each month, and notice of such meeting shall be published in a newspaper of general circulation in the city at least five days in advance thereof. All meetings shall be open to the p0ublic and an agenda for each regular meeting shall be available to the public at City Hall forty-eight hours in advance thereof.

(d) Special meetings may be called on not less than 24 hours notice by the chairperson or by written notice signed by four voting members. ~~No official act on shall be taken during any special meeting unless four members concur~~.

(e) Minutes shall be kept of all meetings of the KWBMDB and committees thereof.
(f) If a member is absent from two of three consecutive meetings without cause and without prior approval of the chairperson, the KWBMDB may declare the member's office vacant.

24.07 Revenues and budgeting thereof
(a) Not less than ninety (90) days prior to the end of each fiscal year of the KWBMD, which shall be the same fiscal year as that of the city, the board shall adopt by resolution its proposed budget for the following fiscal year, and submit the same to the City Commission. Such proposed budget shall include all anticipated expenditures of the district for all of its projects during the ensuing fiscal year, including operating expenses, capital outlays, materials, labor, equipment, supplies, payments of principal and interest on all outstanding revenue bonds, and sinking fund and reserve requirements, and payment of excess funds into the City's General Revenue Fund. Such proposed budget shall provide for expenditures only to the extent of funds legally/available to the district for such purposes and reasonably anticipated revenues of the district for the ensuing fiscal year from established sources, based upon past experience and reasonable projections thereof, and from new projects or new sources of income of the district. The City Commission shall, conduct a public hearing with respect thereto, and in that event, the chairman or his/her designee and manager of the district shall be present at such public hearing.

each project under its control during the preceding fiscal year, including all matters relating to rates, charges, revenues, expenses of maintenance, repair and operation and of replacements and extensions, principal and interest retirement and the status of all funds. Copies of such annual reports shall be filed with the City Clerk..

24.08 Changes and Amendments
Any change, amendment or repeal of this Ordinance may be affected only by a supermajority vote of the City Commission.

24.09 Key West Bight management district: Sunset
The Key West Bight management District and the Board created herein shall not be disbanded or repealed prior to the retirement or defeasance [of the]1992 Key West Bight Marina Conservation Bond.

24.10 Conflict
Nothing herein shall be construed to be in conflict with the City of Key West Charter, Code or Marina Bond covenants.

Section 2. All Ordinances or parts of Ordinances of said City in conflict with the provisions of this Ordinance are hereby superseded to the extent of such conflict.

Section 3. If any section, provision, clause, phrase, or application of this ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, the remaining provisions of this ordinance shall be deemed severable therefrom and shall be construed as

reasonable and necessary to achieve the lawful purposes of this ordinance.

Section 4. This Ordinance shall go into effect immediately upon its passage and adoption and authentication by the signatures of the presiding officer and the Clerk of the Commission.

Read and passed on first reading at a regular meeting held this 24 day of May, 1993.

Read and passed on final reading at a regular meeting held this 3rd day of June, 1993.

S:/
DENNIS J. WARDLOW
MAYOR

ATTEST:
S:/
JOSEPHINE PARKER, CITY CLERK

ORDINANCE NO. 96-3

AN ORDINANCE OF THE CITY OF KEY WEST, FLORIDA, AMENDING CHAPTER 24 ENTITLED "KEY WEST BIGHT MANAGEMENT DISTRICT BOARD" BY AMENDING SECTION 24.03 TO ESTABLISH DAY-TO-DAY MANAGEMENT DUTIES OF THE BIGHT AS A CITY MANAGER RESPONSIBILITY; AMENDING SECTION 24.04 TO ALTER THE QUALIFICATIONS OF BOARD MEMBERS; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEAL OF INCONSISTENT PROVISIONS; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the Key West Bight Management District Board ("KWBMDB") at its meeting of February 21, 1996, recommended ordinance amendments regarding the operation of the Key West bight; and

WHEREAS, the City Manager recommends such ordinance amendments; and

WHEREAS, the City Commission finds that such ordinance amendments will serve the best interest of the citizens of Key West;

APPENDIX J

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF KEY WEST, FLORIDA:

Section 1: That Section 24.03 of the Code of Ordinances is hereby amended as follows:

Section 24.03 Powers and duties of Board; responsibility of City

The KWBMDB shall have the following duties:

(a) ~~(1) Prescribe the duties and responsibilities of the manager;~~

~~(2) To hire future manager(s) and negotiate management contracts subject to approval by the City Commission;~~

~~(3) To terminate manager(s) according to the terms of any contract;~~

~~(4)~~(1) Oversee the operation and development of an expanded public marina on the Key West Bight property;

~~(5) Supervise the manager in performance of those duties contracted for by the manager;~~

~~(6)~~(2) Facilitate and approve application for all required permits necessary for redevelopment and/or expansion of the uplands property and marina;

~~(7)~~(3) Make application to the trustees of the internal improvement trust fund for renewal of all baybottom lease rights and apply for those deemed necessary to carry out marina expansion plans;

~~(8)~~(4) Identify and recommend grant applications for approval by the city commission;

*(Coding: Added language is underlined; deleted language is ~~struck through~~.)

~~(9)~~(5) Review and approve the annual budget and business plan prepared by the manager prior to submission for approval or disapproval by the city commission (without line item veto);

~~(10)~~(6) Approve rental rates and lease terms negotiated by the manager for marina and upland tenants at Key West Bight; all leases shall be consistent with the City Charter, Code of Ordinances and the Marina Bond Covenants;

~~(11)~~(7) ~~The board shall r~~Review all conflicts between the manager and tenants; all decisions of the Key West Bight Management District Board regarding ~~day to day operation of the Key West Bight Marina~~, the terms and management of the rental property and administration of leases shall be final;

~~(12)~~(8) All matters within the Key West Bight subject to review and/or approval by the community redevelopment agency shall be considered by the board for review and comment only.

c. The City by and through its city manager shall have day-to-day responsibility for the operation of the Key West Bight. The Bight Manager shall be an employee of the City, subject to hiring, supervision and termination by the city manager. Additionally, the city manager shall prescribe the duties of the Bight Manager upon the advice and consent of the KWBMDB.

Section 2: That Section 24.04 of the Code of Ordinances is hereby amended as follows:

Sec. 24.04 Composition and terms; compensation.

The KWBMDB board shall consist of seven (7) members who shall reside in Key West, or have a business or profession located in Key West, and reside in the lower keys (south of the seven-mile bridge), and shall be appointed by

vote of the city commission. No voting member shall have any ownership interest in any business located in the KWBMD or shall be employed by a tenant or ownership interest located in the KWBMD.
The Mayor shall present a slate of nominees to the commission with not less that two (2) nor more than (3) nominees for each discipline to be represented. The nominee from each discipline receiving the highest number of votes shall be appointed. At least one (1) person with demonstrated interest in community service from each of the following disciplines shall be represented on the KWBMDB: legal; accounting; banking; historic preservation; maritime; real estate; Chamber of Commerce. In the event no applicant is reasonably available to represent a discipline, the Mayor may nominate a person from outside of the discipline.

Section 3: If any section, provision, clause phrase, or application of this Ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, the remaining provisions of this Ordinance shall be deemed severable therefrom and shall be construed as reasonable and necessary to achieve the lawful purposes of this Ordinance.

Section 4: All Ordinances or parts of Ordinances of said city in conflict with the provisions fo this Ordinance are hereby superseded to the extent of such conflict.

Section 5: This Ordinance shall go into effect immediately upon its passage and adoption and authentication by the signature of the presiding officer and the Clerk of the Commission.

Read and passed on first reading at a regular meeting held this ___3rd___ day of March, 1996.

Read and passed on final reading at a regular meeting held this ___19th___ day of March, 1996.

Authenticated by the presiding officer and Clerk of the Commission on ___22nd___ day of March, 1996.

Filed with the Clerk March 22, 1996.

S:/ _____
Dennis J. Wardlow, Mayor

Attest: S:/ _____
Josephine Parker, City Clerk

ARTICLE IV. EXECUTIVE AND ADMINISTRATIVE

4.01 City Manager.

There shall be a city manager who shall be the chief executive and the administrative officer of the city. The manager shall be responsible to the commission for the administration of all city functions and affairs placed in his charge by or under this Charter.

4.02 Appointment of manager.

The commission shall appoint a city manager for an indefinite term by a majority vote of all the commissioners to serve at the pleasure of the commission.

4.03 Designation of administrative officer during temporary absence of manager.

By letter filed with the clerk, the manager shall designate, subject to approval of the commission, a qualified city administrative officer to exercise the powers and perform the duties of manager during his temporary absence or disability. During such absence or disability, the commission may revoke such designation at any time and appoint another officer of the city to serve until the manager shall return or his disability shall cease.

4.04 Duties of city manager.

The city manager shall:

(a) Appoint, and when he deems it necessary for the good of the city, suspend or remove all city employees and appointive administrative officers provided for by or under this Charter, except as otherwise provided by law, this Charter, civil service board rules and regulations or personnel rules adopted pursuant to this Charter. He may authorize any administrative officer who is subject to his direction and supervision to exercise these powers with respect to subordinates in that officer's department, office[r], or agency;

(b) Direct and supervise the administration of all departments, offices and agencies of the city, except as otherwise provided by this Charter or by law;

©) Attend all commission meetings and shall have the right to take part in discussion but may not vote;

(d) See that all laws, provisions of this Charter and acts of the commission, subject to enforcement by him or by officers subject to his direction and supervision, are faithfully executed.

4.05 Department of city.

All functions of municipal government shall be allotted among various departments including, but not limited to, a finance department, a department of general services, a police department and a fire department. Police and fire departments shall be headed by a police chief and a fire chief whose chiefs shall have exclusive control of the stationing and transfer of all officers and employees of the department as may be prescribed by the ordinances of the city. Department heads shall be considered employees of the city and covered by the civil service system.

4.06 City attorney.

There shall be a city attorney who shall be the legal advisor to, and attorney and counselor for, the municipality and all of its officers, boards, commissions, agencies, authorities and subdivisions except as otherwise expressly provided by general or special law. The city attorney shall be appointed by, and shall serve at the pleasure of, the city commission. The city attorney may appoint an assistant or assistants, subject to confirmation by the city commission, who shall serve at the pleasure of the city attorney.

...

Respectfully submitted,

Arnaud Girard
P.O. Box 6263
Key West, FL 33041
(305) 731-4723
(305) 731-7299